

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
AUBURN NETWORK, INC.)	MB Docket No. 21-20
)	
WANI(AM), Opelika, AL)	Facility ID No. 63796
)	
WGZZ(FM), Waverly, AL)	Facility ID No. 15283
)	
W242AX(FX), Auburn, AL)	Facility ID No. 146140
)	
W254AY(FX), Auburn, AL)	Facility ID No. 138347
)	
W294AR(FX), Auburn, AL)	Facility ID No. 14119
)	
WHBD-LD, Auburn, AL)	Facility ID No. 185816
)	
Application for Original Construction Permit)	File No. BNPFT-20180327ABZ
NEW(FX), Auburn, AL)	Facility ID No. 201389

FOURTH DISCOVERY ORDER

Issued: August 31, 2021

Released: August 31, 2021

1. The above-captioned proceeding seeks to determine whether the felony convictions of Michael G. Hubbard, the President and 100 percent shareholder of Auburn Network, Inc. (ANI) render him, and by extension ANI, unqualified to remain a Commission licensee. This Fourth Discovery Order addresses assertions of privilege in response to requests for the production of certain documents and resolves other pending matters.¹

ANI's Privilege Log

2. The *First Discovery Order* in this proceeding directed ANI to produce documents in response to the following document request posed by the Enforcement Bureau:

Provide all documents concerning and/or relating to the 23 charges of violation of the Alabama Ethics Code brought against Hubbard, and any adjudication thereof, including the 12 felony counts of violation of the Alabama Ethics Code on which Hubbard was convicted, including but not limited to, any charging documents, criminal complaints, evidence, exhibits, written testimonies, judgments, jury findings, legal briefs,

¹ Previous discovery orders in this proceeding are as follows: *Auburn Network, Inc.*, MB Docket No. 21-20, FCC 21M-06 (ALJ May 12, 2021) (*First Discovery Order*); *Auburn Network, Inc.*, MB Docket No. 21-20, FCC 21M-09 (ALJ July 20, 2021) (*Second Discovery Order*); *Auburn Network, Inc.*, MB Docket No. 21-20, FCC 21M-11 (ALJ August 3, 2021) (*Third Discovery Order*).

plea deals, negotiations, petitions, memoranda, certificates of judgment, and opinions or judgments of the Lee County Circuit Court, the Alabama Court of Criminal Appeals, and/or the Supreme Court of Alabama.²

The Presiding Judge limited the inquiry to the six felonies for which Mr. Hubbard now stands convicted,³ and directed ANI to either produce responsive documents or describe them in a privilege log in a manner sufficiently specific to support a claim of privilege. ANI was not required to include internal drafts and memoranda not shared beyond the firms involved in Mr. Hubbard's criminal case. Because ANI had argued that it would be exceedingly burdensome to search through seven years of documents located in four law firms, the Presiding Judge extended the usual 10-day deadline for production of records specified in section 1.325 of the Commission's rules, 47 CFR § 1.325. ANI was instead given 60 days from the release date of the *First Discovery Order* to submit the required information.⁴

3. ANI timely submitted a 37-page document entitled "Privilege Log" on July 12, 2021. It consisted of more than 350 entries, all emails, and identified for each the date and subject of the email, the sender and recipient, and other people who were copied, if any. One entry was withheld based on the attorney work product privilege, and all the others were withheld pursuant to attorney-client privilege. On July 23, the Enforcement Bureau filed a motion to compel ANI to revise its privilege log or to submit its documents for an *in camera* review by the Presiding Judge.⁵ The Enforcement Bureau notes that ANI did not identify which of the individuals included on the emails are attorneys. Indeed, the Bureau argues, a number of the individuals for which attorney-client privilege is claimed do not appear to be attorneys.⁶ The Enforcement Bureau also seeks more specific descriptions of the emails from ANI, and indicates that some appear to be either not responsive to the Bureau's document request or to not contain legal advice.⁷ In the alternative, to expedite resolution of these privilege issues, the Bureau suggests that the Presiding Judge review *in camera* the documents for which a privilege is claimed.⁸

4. In its opposition to the Enforcement Bureau's motion to compel, ANI submits that its privilege log was primarily based on one prepared by Mr. Hubbard's then-attorneys before criminal charges were filed, a subsequent privilege log prepared by the firm that represented him during his criminal trial, and submissions from communications law firms that represented ANI before the FCC.⁹

² Enforcement Bureau's First Request for Production of Documents and Things to Auburn Network, Inc., MB Docket No. 21-20 (submitted Mar. 30, 2021), Request No. 1.

³ Mr. Hubbard was originally charged with 23 counts of violating the Alabama Ethics Code. A jury convicted him of 12 counts, six of which were reversed on appeal. *First Discovery Order* at para. 10.

⁴ *Id.* at para. 11. ANI was afforded 20 days to provide copies of publicly-available documents or sufficient information to enable the Bureau to locate those documents online. *Id.* at paras. 5, 13.

⁵ Enforcement Bureau's Motion to Compel Auburn Network Inc. to Revise its Privilege Log, or, in the Alternative, to Submit its Documents for an *In Camera* Review, MB Docket No. 21-20 (filed July 23, 2021) (EB Second Motion to Compel).

⁶ *Id.* at 3-5.

⁷ *Id.* at 5-7.

⁸ *Id.* at 8.

⁹ Auburn Network Inc.'s Opposition to Enforcement Bureau's Motion to Compel, MB Docket No. 21-20 (filed Aug. 12, 2021) at 2-3 (ANI Opposition to EB Second Motion to Compel).

ANI further provides a list of 32 individuals included in the privilege log that it avers are either attorneys or their staff who represented Mr. Hubbard. It also lists eight individuals listed in the privilege log who the Enforcement Bureau has identified as possibly not being attorneys. ANI contends that the 19 emails for which those eight people are authors or recipients are not relevant to issues in this hearing proceeding.¹⁰

5. To support a claim of attorney-client privilege, the party asserting the privilege must show (1) the existence of an attorney-client relationship; (2) the existence of a communication from the client to his or her attorney; (3) that the communication is legally related; and (4) that there is an expectation of confidentiality as to that communication.¹¹ The privilege also encompasses communications from the attorney to the client,¹² and between the client and the attorney's non-attorney representatives.¹³ ANI did not initially identify in its privilege log whether the named individuals on its list are attorneys or their representatives, but did supply that information in its opposition to the Bureau's motion to compel. While this information should have been included with the original privilege log, the first two prongs of the above test will be considered to be satisfied with respect to communications between Mr. Hubbard and the individuals identified as attorneys who represented him and their staffs. The Bureau also contends that the descriptions of the documents listed on the privilege log are not sufficiently detailed to allow for assessment of whether the attorney-client privilege is justified.¹⁴ For instance, the Bureau submits that some of the emails between Mr. Hubbard and his attorneys are simply labeled as "legal advice." The Presiding Judge is satisfied that a communication described as "legal advice" or some similar designation that is between Mr. Hubbard and attorneys who represented him or their staffs does indicate that it is legally related and that an expectation of confidentiality existed.

6. ANI's privilege log is not acceptable in its current form, however. The *First Discovery Order* afforded ANI a significant amount of additional time to produce the privilege log based on ANI's assertion that the records it had to review were copious. Ultimately, though, it appears that ANI simply repurposed two preexisting privilege logs created for the criminal proceedings and appended some more recent entries. By ANI's own account, some of the entries "are not connected to the 23 counts with which Mr. Hubbard was charged or the 6 counts on which he was convicted, therefore, they are not relevant to this proceeding."¹⁵ Yet, as ANI quotes from the *First Discovery Order*, the Presiding Judge directed ANI "to provide a privilege log including all responsive documents for which it claims a privilege exists, excluding internal drafts and memoranda."¹⁶ The Presiding Judge emphasizes the phrase "responsive documents," as ANI evidently did not. Specifically, the reason for requiring ANI to submit a privilege log was as follows:

The Presiding Judge cannot rule on claims of privilege without some idea of the

¹⁰ *Id.* at 4-7. Two people appear on both lists – Rick Davidson and Jason Isbell

¹¹ *Maritime Communications/Land Mobile, LLC*, EB Docket No. 11-71, 33 FCC Rcd 11822, 11842-43 (2018) (*Maritime*); see also *WWOR-TV, Inc.*, 5 FCC Rcd 6261, 6262 (1990).

¹² *Maritime*, 33 FCC Rcd at 11843 n.171.

¹³ *Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014).

¹⁴ EB Second Motion to Compel at 6-7.

¹⁵ ANI Opposition to EB Second Motion to Compel at 6.

¹⁶ *Id.* at 2 (quoting *First Discovery Order* at para. 11).

underlying documents for which the privilege is being asserted. Information regarding the felonies of which Mr. Hubbard stands convicted is directly probative of the effect of those convictions on his and ANI's qualifications to be a Commission licensee, which is the inquiry at the crux of this case. If ANI is in possession of such documents, it must either produce them or describe them in a privilege log in a way that is sufficiently specific to support a claim of privilege.¹⁷

7. Neither the Enforcement Bureau nor the Presiding Judge should have to surmise which of the 350-plus documents identified as privileged are related to Mr. Hubbard's felonies and which are not. Accordingly, ANI is directed to revise its privilege log to include only responsive documents consistent with the *First Discovery Order*. Resolution of this case rests on an evaluation of the circumstances of the activities for which Mr. Hubbard was criminally convicted.¹⁸ Thus, documents to be included in the revised privilege log must only be those that relate to the activities that form the basis for the six remaining felony convictions. Documents that only include information regarding counts for which Mr. Hubbard was not convicted, that only involve convictions that were overturned, or that otherwise do not contain the facts underlying the six remaining felony convictions must be excluded from the revised privilege log. The Enforcement Bureau's motion to compel is therefore granted in part. ANI's revised privilege log is to be filed within ten days of the release date of this Fourth Discovery Order.

The Enforcement Bureau's Motion to Submit an Additional Pleading

8. The day after ANI filed its opposition to the Enforcement Bureau's motion to compel revision of the privilege log, the Bureau submitted both a motion requesting that it be permitted to file a reply as well as the reply itself.¹⁹ The Bureau seeks to clarify its intention that, in the event that *in camera* review is conducted, the Presiding Judge should review all of the documents listed as privileged, not merely the 19 identified by ANI as being from parties who are not attorneys. The Bureau is concerned that clarification of that point is needed because of ANI's statement in its opposition that it does not object to *in camera* review of those 19 documents.²⁰ In response, ANI on August 16, 2021, filed a motion to strike the reply and asked that the Enforcement Bureau be sanctioned for abuse of process.²¹ The Bureau filed an opposition to that motion on August 18, 2021.²² As ANI indicates in its motion to strike, the reply proffered by the Bureau is not necessary because it was clear from the context of the Bureau's motion to compel that it sought *in camera* review of all documents listed, not just those involving non-attorneys.²³ The Bureau's request to file a reply will therefore be denied, which renders ANI's motion to

¹⁷ *First Discovery Order* at para. 11.

¹⁸ *Second Discovery Order* at para. 9; *Third Discovery Order* at paras. 8-9.

¹⁹ Enforcement Bureau's Motion for Leave to File a Reply in Support of its Motion to Compel, MB Docket No. 21-20 (filed Aug. 13, 2021); Enforcement Bureau's Reply in Support of its Motion to Compel, MB Docket No. 21-20 (filed Aug. 13, 2021).

²⁰ Enforcement Bureau's Motion for Leave to File a Reply in Support of its Motion to Compel at 1-2 (citing ANI Opposition to EB Second Motion to Compel at 7 n.4).

²¹ Auburn Network, Inc., Motion to Strike the Enforcement Bureau's Unauthorized Reply and Motion for Sanctions, MB Docket No. 21-20 (filed Aug. 16, 2021) (ANI Motion to Strike and for Sanctions).

²² Enforcement Bureau's Opposition to Auburn Network Inc.'s Motion to Strike and for Sanctions, MB Docket No. 21-20 (filed Aug. 18, 2021) (EB Opposition to Motion to Strike and for Sanctions).

²³ ANI Motion to Strike and for Sanctions at 3.

strike moot.

9. It does not follow, however, that the Enforcement Bureau abused the Commission's processes in seeking leave to file a reply. ANI alleges that the Bureau "wants Auburn to continue jumping through hoops until it simply gives up and withdraws from this case."²⁴ On the contrary, the purported "hoops" were discovery decisions made by the Presiding Judge and, as detailed above, ANI did not provide an appropriately targeted and explanatory response. The Enforcement Bureau correctly indicates that it is common practice for parties to a hearing proceeding to seek leave to file pleadings that are not specifically delineated by the Commission's rules.²⁵ It is likewise not unusual for an additional pleading to be filed at the same time as the motion requesting permission to file it, in the interest of expediency. Such flexibility is essential to allow the Presiding Judge to conduct each proceeding in an equitable way that is suitably responsive to the unique circumstances presented. ANI also cites as abusive a pleading that the Bureau filed late.²⁶ ANI's motion to strike that pleading was previously considered and denied by the Presiding Judge and will not be relitigated.²⁷ ANI is reminded that it too filed a pleading after the due date, which was similarly accepted.²⁸ In addition, ANI repeats its allegation that the Bureau engaged in unauthorized contact with the Media Bureau prior to release of the Hearing Designation Order in this proceeding.²⁹ The Presiding Judge has already indicated that an examination of the process that resulted in the Hearing Designation Order is not relevant to this case.³⁰ Allegations regarding the Enforcement Bureau's activities prior to designation of this matter for hearing are outside the scope of this hearing proceeding and therefore cannot support ANI's claim of abuse of process. For these reasons, ANI's motion for sanctions will be denied.

The Enforcement Bureau's pre-FOIA List

10. The *Second Discovery Order* in this proceeding, which considered ANI's request for production of internal Commission documents, directed the Enforcement Bureau to submit a list of documents in possession of the trial staff that reference Mr. Hubbard's felony convictions. Because production of nonpublic Commission documents would require ANI to submit a request via the Commission's Freedom of Information Act (FOIA) process, the Bureau's list was intended "[t]o afford ANI sufficient information to determine whether to incur the effort, expense, and possible delay inherent in filing a FOIA request."³¹ Consistent with section 1.311(b)(3) of the Commission's rules, 47 CFR § 1.311(b)(3), the Bureau's list was limited to information regarding the existence, nature, description, custody, condition, and location of responsive documents without disclosing their contents.³² In its opposition to the Enforcement Bureau's motion to compel it to revise its privilege log, ANI responds to

²⁴ *Id.* at 4.

²⁵ EB Opposition to Motion to Strike and for Sanctions at 3.

²⁶ ANI Motion to Strike and for Sanctions at 5.

²⁷ *Third Discovery Order* at para. 14.

²⁸ *First Discovery Order* at para. 15.

²⁹ ANI Motion to Strike and for Sanctions at 5-6.

³⁰ *Third Discovery Order* at para. 8.

³¹ *Second Discovery Order* at para. 8.

³² *Id.*

the Bureau's argument that ANI's privilege log did not provide sufficient detail by referencing the lack of detail provided by the Bureau in its own list.³³ This is similar to the argument raised by ANI in a motion to compel the Enforcement Bureau to revise its list to provide more detailed information, filed on August 9, 2021.³⁴ ANI contends in its motion to compel that public documents on the Bureau's list should be identified, that emails on the list should be individually delineated, and that those emails as well as the two letters on the list should be described in greater detail.³⁵ ANI also takes issue with the Enforcement Bureau not producing responsive documents created after the date that the Hearing Designation Order in this proceeding was released, and not identifying 15 documents attached to emails that it indicates are subject to the attorney work product privilege.³⁶

11. The Enforcement Bureau responds that it provided all information required by the Presiding Judge and the Commission's rules.³⁷ It also reiterates that the only two communications between Bureau staff and other parts of the Commission after release of the Hearing Designation Order are already in ANI's possession.³⁸ Regarding the documents identified as subject to the attorney work product privilege, the Bureau notes that those were all intra-agency communications prepared prior to release of the Hearing Designation Order, documents typically withheld from release pursuant to the FOIA rules.³⁹ Finally, the Bureau contends, none of the information sought by ANI in its Second Motion to Compel is relevant to the determination of whether Mr. Hubbard's felonies render him and/or ANI unqualified to remain a licensee.⁴⁰

12. ANI's comparison of its privilege log and the Enforcement Bureau's list is inapposite. The privilege log, as required by the *First Discovery Order*, was ordered as a response to ANI's nonspecific assertion that many of the documents sought by the Bureau were subject to attorney-client privilege. A party typically may not assert the privilege on a blanket basis.⁴¹ To properly and fairly assess ANI's claims, the Presiding Judge directed that ANI submit more information. On the other hand, the Enforcement Bureau's list, required by the *Second Discovery Order*, was not generated in response to a claim of privilege. Rather, it was aimed at disclosing the limited amount of information regarding internal Commission records that is permitted by the Commission's rules so as to assist ANI in deciding

³³ ANI Opposition to EB Second Motion to Compel at 7.

³⁴ Auburn Network Inc.'s Second Motion to Compel Complete Responses to its Request for Production of Documents, MB Docket No. 21-20 (filed Aug. 9, 2021) (ANI Second Motion to Compel).

³⁵ *Id.* at 3.

³⁶ *Id.* at 3-4.

³⁷ Enforcement Bureau's Opposition to Auburn Network Inc.'s Second Motion to Compel, MB Docket No. 21-20 (filed Aug. 10, 2021) at 2-4 (EB Opposition to ANI Second Motion to Compel).

³⁸ *Id.* at 3 n.9. As described in the *Second Discovery Order* in this proceeding, a Media Bureau employee was inadvertently copied on an email message sent from the Enforcement Bureau to ANI's counsel. The Enforcement Bureau instructed the unintended recipient to disregard the message and provided ANI with a copy of that instruction. *Second Discovery Order* at para. 6.

³⁹ EB Opposition to ANI Second Motion to Compel at 3-4 (citing 47 CFR 0.457(e)).

⁴⁰ *Id.* at 5-6.

⁴¹ *Maritime, supra*, at 11843 (citing *Black Television Workshop of Los Angeles, Inc.*, 7 FCC Rcd 6868, 6869 (1992)).

whether to pursue a FOIA request. The Presiding Judge could have simply denied ANI's initial motion to compel without requiring more information of the Bureau, but decided that it was in the interest of due process and the orderly progression of this hearing proceeding to afford ANI as much information as possible to enable it to make an informed decision. The Enforcement Bureau's list is consistent with what the *Second Discovery Order* directed it to provide. ANI's second motion to compel will therefore be denied.

Conclusion

13. This matter was designated for hearing based on longstanding Commission policy that a felony conviction is relevant to whether a licensee possesses the character to be a Commission license, in accord with the Communications Act.⁴² To that end, the goal of discovery in this proceeding is to develop evidence that will enable the Presiding Judge to understand the activities that were adjudged to be felonious and to evaluate the impact of those activities on the licensee's "honesty and probity . . . in a regulatory system that is largely self-policing."⁴³ The Presiding Judge has attempted to enable targeted and useful discovery that "appears reasonably calculated to lead to the discovery of admissible evidence," consistent with the Commission's rules.⁴⁴ Given that a significant volume of information regarding the facts and circumstances of Mr. Hubbard's convictions already has been produced, and as the October 15, 2021, deadline for completion of discovery draws closer,⁴⁵ the Presiding Judge expects that additional discovery issues that might be raised will not stray from consideration of the effect of Mr. Hubbard's felonies on his and ANI's qualifications to hold Commission licenses.

Ordering Clauses

14. Accordingly, **IT IS ORDERED** that the Enforcement Bureau's Motion to Compel Auburn Network to Revise its Privilege Log, or, in the Alternative, to Submit its Documents for an *In Camera* Review, filed July 23, 2021, **IS GRANTED** to the extent indicated herein and **IS OTHERWISE DENIED**.

15. **IT IS FURTHER ORDERED** that Auburn Network, Inc., **SHALL FILE** a modified privilege log as described herein **WITHIN TEN CALENDAR DAYS** of the release date of this order.

16. **IT IS FURTHER ORDERED** that the Enforcement Bureau's Motion for Leave to File a Reply in Support of its Motion to Compel, filed August 13, 2021, **IS DENIED**.

17. **IT IS FURTHER ORDERED** that Auburn Network, Inc.'s Motion to Strike the Enforcement Bureau's Unauthorized Reply and Motion for Sanctions, filed August 16, 2021, **IS DISMISSED AS MOOT** to the extent indicated above and **IS OTHERWISE DENIED**.

⁴² *Auburn Network, Inc.*, Hearing Designation Order, Order to Show Cause and Notice of Opportunity for Hearing, MB Docket No. 21-20, 36 FCC Rcd. 1282 (MB 2021). See also *Policy Regarding Character Qualifications in Broadcast Licensing*, Policy Statement and Order, 5 FCC Rcd. 3252 (1990) *modified*, Memorandum Opinion and Order, 6 FCC Rcd. 3448 (1991), *further modified*, Memorandum Opinion and Order, 7 FCC Rcd. 6564 (1992).

⁴³ *Contemporary Media, Inc. v. FCC*, 214 F.3d 187, 193 (D.C. Cir. 2000), cert. denied, 532 U.S. 920 (2001).

⁴⁴ 47 CFR § 1.311(b).

⁴⁵ See *Third Discovery Order* at para. 11.

18. **IT IS FURTHER ORDERED** that Auburn Network, Inc.'s Second Motion to Compel Complete Responses to its Request for Production of Documents, filed August 9, 2021, **IS DENIED**.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, appearing to read 'J. Halprin', is written over the printed name.

Jane Hinckley Halprin
Administrative Law Judge